In the Supreme Court of the United States

OCTOBER TERM, 1924

THE WESTERN PACIFIC RAILROAD COMPANY, appellant
v.
THE UNITED STATES

No. 287

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR APPELLEE

Statement of the Case

During a period from September 24, 1914 to June 18, 1916, appellant's predecessor in title to the claims hereinafter described, upon requests from the United States, transported certain persons, not soldiers in service, to destinations named in the requests. Having rendered the services requested, the transporting company billed the United States therefor at the reduced rates obtaining by agreement and as a result of land grants originally made to the company for the transportation of "troops of the United States." When the requests were made and the transportation given the persons named in the

requests were held by the United States to fall within the classification, "troops of the United States." The company voluntarily billed the United States upon that basis at reduced rates, certifying in the case of each bill submitted to the disbursing officers of the government that the amount therein stated was the correct and just account of the company with the United States for the services rendered. The form used appears on page 69 of the Record as an Appendix to the Findings of Fact of the Court below. Immediately preceding this form, on page 68 of the Record, also an Appendix to the Findings of Fact, is the form prescribed for use by railroads for services rendered at commercial rates, where no land grant reductions were involved. In no case did the company make use of this form. In every case the form set out on page 69 of the Record was employed. This form contained the printed injunction that the "Bill must be completely filled out by the Transportation Company before certification, *and there must not be any erasure or other alteration whatever.*" [Italics ours.]

Notwithstanding and in violation of this injunction the company caused to be typewritten across the face of the bills submitted by it and involved in this controversy the so-called protest set out in Finding of Fact No. VIII, appearing in the Record at page 56. Bearing this protest, the bills were presented to the disbursing officers, who had no authority to make partial settlements of the claims presented but only to pay them in full in accordance with the

tenor of the form prescribed and used, and who, upon the presentation of the bills, paid the amounts therein claimed, which were thereupon accepted by the company. The disbursing officers had no authority or discretion to pass upon or give effect to protests and were under no duty to communicate them before payment. In the regular course they would not come to the attention of the accounting officers of the government until long after payment was made and then only incidentally in the settlement of the disbursing officers' accounts.

The amount now asked is $11,055.76 (Finding of Fact No. XI, page 57 of the Record), being the difference between what the company would have received at commercial rates and the amounts certified by it as what it claimed and which it was paid. Of the amount now asked (as appears from the petition, although not from the Findings of Fact), $4,453.14 is for transportation furnished before February 2, 1915, or more than six years before the filing of the original petition herein in the Court of Claims.

The claims of the transporting company, together with its other assets, were sold to the appellant by a special master appointed by and under the direction of a United States District Court (Finding of Fact No. III, page 53 of the Record). The deed conveying the property was executed on July 1, 1916. At the time of the sale the railway system involved was being operated by receivers.

Four questions present themselves:

(1) Whether the assignment just described is within the prohibition of Section 3477, R. S.?

(2) Whether the six-year statute of limitations governing causes of actions filed in the Court of Claims does not defeat at least a substantial part of the claim?

(3) Whether, absent the so-called protest, the claimant would be entitled to the alleged balance, having been paid in full the bills presented in which the amounts claimed were stated as correct and just?

(4) Whether the so-called protest saved any rights that otherwise ceased upon the payment and acceptance of the amounts stated in the bills presented to the government.

The court has ordered this case submitted together with No. 285, *Southern Pacific Company, appellant,* v. *The United States.* Questions (1) and (2) above stated, however, are not in that case. They will, therefore, be discussed in full in this brief. Questions (3) and (4) are common to the two cases. For a full discussion of those questions reference is made to the brief of the United States in the *Southern Pacific Case.*

ARGUMENT

I

These claims have been assigned within the meaning of Section 3477, R. S., for which reason recovery can not be had thereon.

These claims, together with other assets, were sold to the appellant by a Special Master acting under the direction of a United States District

Court as a result of a decree of that court in an action brought by a trustee against the railway company by which the transportation involved in this case was furnished the United States.

Section 3477 R. S. provides that:

> All transfers and assignments made of any claim upon the United States, or any part or share thereof, or interest therein whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless they are freely made or executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Unquestionably the assignment here was within the literal meaning of this statute. Appellant argues, however, that it was not within the intent of the statute and refers on pages 28, 29, and 30 of its brief to certain cases decided by this court stating exceptions to the literal prohibition of the statute. But this case does not fall within any one of the exceptions so stated. It does fall, as we think, within the principle stated by this court in *St. Paul & Duluth Railroad Company* v. *United States*, 112 U. S. 733.

In that case the property of the railroad company including the claims against the United States had been voluntarily assigned by the company by mort-

gage. Later the mortgage was foreclosed. By a judicial sale consequent thereupon the title came into others than the original claimant against the United States. This court held such an assignment within the prohibition of the statute.

Is not that precisely this case?

Here an action was brought by a trustee against the railway company and the sale was consequent to a decree in that action. It does not appear from the Finding of Fact (No. III, page 53 of the Record) upon what the action was based. The reasonable inference is that it was upon an instrument in the nature of a deed of trust or a mortgage. If so, then the facts are exactly parallel with the case cited.

Certainly the burden is upon the appellant to show from the record that the assignment here, being within the words of the statute, is within the exceptions thereto. The *St. Paul & Duluth Railroad Company case* holds that an original voluntary transfer later completed by an involuntary judicial sale does not fall within the exceptions.

II

The six year statute of limitations applies to a large part of the claim

It appears from Finding of Fact No. XI, page 57 of the Record, that the transportation involved was furnished between September, 1914, and June 18, 1916. From other Findings of Facts stated it appears that requests were made for the transportation of individuals and the transportation given thereupon.

Obviously each such instance gave rise to a separate cause of action against the United States, unless, indeed, these persons were carried under the general agreement with the United States as to the "transportation of troops," in which event appellant has of course been fully paid. The petition herein was filed February 2, 1921. It is submitted, therefore, that in no event could there be recovery for any transportation furnished prior to February 2, 1915. And, since the record does not show what part of the total claim falls within this class (although it appears in the petition to have been all the items shown on pages 10–19 of the record, inclusive), a further finding of fact would be necessary before the exact amount so outlawed could be determined.

III

Payment of the amounts claimed in bills certifying the account stated to be correct and just and the acceptance thereof finally settled the whole matter

Appellant bases its case wholly upon the effect of the so-called protest which was written across the bills rendered to the United States by the transporting company. We assume it is conceded that absent that protest there would be no case. If there was a dispute as to the amount due the company, the company adopted the government's theory, voluntarily presented its bills upon the basis contended for by the United States, stated that the amount of its claim was so much, which could only mean that the total amount of its claim was the amount named,

certified it as correct and just, and asked, received, and accepted payment on that basis. Such is a perfect case of accord and satisfaction.

IV

The so-called protest was valueless

In the companion case, No. 285, submitted by order of the court with this case, we have discussed from the standpoint of the United States the effect of such a protest as was here employed. Reference is made to our brief in that case and particularly to subdivisions II, III, and IV of the argument. A mere repetition here would not be helpful. But we summarize the reasons for our contention that the protest used was valueless:

First. Knowing that it was the understanding of the United States that the persons requested to be transported were to be carried at the rates agreed on for the "transportation of troops" and thereupon transporting them without protest, the company agreed to the reduced rates, and no subsequent protest should alter the effect of such an agreement.

Second. The so-called protest, constituting as it did an alteration in the form of the bill prescribed by the United States and therefore having been placed on the bills wrongfully, was for that reason void, if for no other reason.

Third. The protest was repugnant to the statements made in the bills presented. The bills said, in effect, "the amount of the claim is that stated and payment thereof is payment in full of the account."

whereas the protest in effect said, "no, it will be treated only as partial payment. The entire claim is not stated." The payment of the bills, however, was necessarily in accordance with what appeared lawfully thereon, without modification by reason of something unlawfully appearing. That is to say, the payment was of the accounts in full and the acceptance was subject to that necessary condition. So that here also was accord and satisfaction.

Fourth. The protest was made to disbursing officers at the time of payment. That they had no authority except to pay the accounts in final settlement this appellant knew. They had no discretion to make partial payments or to consider protests. The accounting officers of the government having discretion would not see the protests until long after payment by the disbursing officers and then only incidentally. A protest so made is the same as no protest or as a protest after accord and satisfaction has been completed.

Reference is made to the cases cited in the companion case, particularly to *Oregon-Washington Railroad and Navigation Company* v. *United States*, 255 U. S. 339 (holding that the presentation by the railroad of bills on the land-grant basis and acceptance of the amounts therein claimed forecloses further claims for additional amounts); and to *United States* v. *Adams*, 7 Wall, 463, and *Savage, Executrix*, v. *United States*, 92 U. S. 382 (in both of which, under analogous situations, the futility of a protest is pointed out by this court).

CONCLUSION

It is respectfully submitted that appellant, having elected to settle with the United States on the land-grant basis and having so elected voluntarily and without duress of any kind, is not now entitled to any additional payment whatever. It is further submitted that a substantial part of the total amount claimed is beyond the six years of the statute of limitations and that all of it is within the prohibition of Section 3477, R. S. The decision of the Court of Claims should be affirmed.

JAMES M. BECK,
Solicitor General,
MERRILL E. OTIS,
Special Assistant to the Attorney General.

NOVEMBER, 1924.

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